

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

HOLCOMBE, et. al,

Plaintiffs

vs.

UNITED STATES OF
AMERICA,

Defendant

NO. 5:18-CV-00555-XR

(consolidated cases)

JOINT STATUS UPDATE

Parties would provide the Court the following updates. Parties have generally agreed to designate deposition testimony of certain witnesses. Parties are discussing the potential for calling certain witnesses via trial depositions. The remaining witnesses will be called by live testimony. Parties would describe the plan below, noting agreements and disagreements to the extent they exist.

PARTIES PROPOSALS

1. *Plaintiffs' Proposed Trial Schedule*

Plaintiffs propose the following schedule:

WEEK	EVIDENCE
Oct 4	Live Fact Witness Testimony followed by Plaintiffs' testimony by family group
Oct 11	Live Plaintiffs' testimony by family group
Oct 18	Live Plaintiffs' testimony by family group
Nov. 1	Live Expert Testimony
Nov. 8	Live Expert Testimony
Nov. 15–17	Any final spill-over testimony

See **Exhibit 1** for Plaintiffs' suggested family groupings. Plaintiffs reserve the right to call these families in the order they believe would be most persuasive and efficient.

For testimony by prior deposition, Plaintiffs request that the Court set the following dates: (1) Twenty-one days before the trial, Plaintiffs should file their deposition designations; (2) Fourteen days before the trial, Defendant should file counter designations and any substantive objections; and (3) Seven days before the trial, Plaintiffs should file any reply designations and objections. For trial depositions to be taken, parties agree to limit examination to one hour per side. For trial testimony, parties agree to reasonable time limitations equally applied to both sides. *See* ECF No. 454, at 1.

2. *Plaintiffs' Reasoning*

Plaintiffs have the burden of proof, including the burden of persuasion. As a result, Plaintiffs intend to present the following categories of witnesses: (1) Plaintiffs' live testimony grouped by family and selected common damages fact witnesses; (2) Expert and treating medical witnesses for both sides. Plaintiffs object to the Defendant's proposal for multiple reasons detailed below. Fundamentally, Plaintiffs have the burden of persuasion, and the Government cannot dictate trial strategy, including the order in which Plaintiffs call their witnesses.

First, Plaintiffs will present individual Plaintiffs to offer damages testimony grouped by family and by similar testimony. These witnesses should be grouped by both family and subject matter. And because the parties have stipulated to the admissibility of the expert reports, the Court can assess the experts' economic and non-economic damage conclusions as the families testify. And that will allow Plaintiffs to streamline the live expert testimony portion of trial to 1–2 trial days.¹ Before the trial, Plaintiffs would also present previously-taken deposition designations of certain Plaintiffs and request the Court allow trial depositions of other Plaintiffs. The trial depositions should be limited to one hour per side.

Second, Parties will present expert testimony. This testimony will be grouped by subject matter. For example, Plaintiffs will call their life care planners (who provide testimony on multiple individuals across family groups). Then, Defendant will call their life care planners applicable to the

¹ The parties have substantially progressed on agreeing to past medical expenses and trial exhibits, so the Court will likely have that information to assess individual damages while the families are testifying.

same individuals. Parties have agreed to call experts only for the areas where the parties substantially disagree.

Moreover, while Plaintiffs understand that the Defendant is not limited by budgetary constraints and would like to call the same expert back to the stand multiple times, Plaintiffs ask the Court to consider both monetary and time-efficiency costs of calling the same expert back multiple times. For example, under the Defendant's plan, Dr. Fairchild would be called **four (4) separate times**. Government's expert Marx will testify **five (5) times**. Plaintiffs' expert, Joe Gonzalez testifies **five (5) separate times**. Additionally, Plaintiffs' experts have busy clinical and private practice schedules. Requiring them to appear multiple times would adversely affect those schedules and they may not be available to appear multiple times due to those schedules.

Finally, the Government's mini-trial proposal is "mini" in name only: they intend to call nearly 100 live witnesses. *See* Exh. 2 (Government's proposal). In contrast, Plaintiffs' proposal requires less than 50 live witnesses.

3. Defendant's Proposal Trial Schedule

See **Exhibit 2** for Defendants' suggested grouping proposal.

4. Defendant's Reasoning

The Government's "mini-trial" proposal provides the Court with the information necessary to evaluate the Plaintiffs in each proposed "grouping" as discrete set from the whole. By presenting all Plaintiffs and then the correlating expert and medical witnesses for those Plaintiffs, the Court is

provided the complete picture for that group at once instead of delaying that information until all Plaintiffs have testified.

The Government does not oppose Plaintiffs dictating the order in which the families should be grouped based on family affiliations and similar testimony. The Government's proposal was developed utilizing family relationships determined by its research. The Government accepts that Plaintiffs may have more accurate information to develop logical groupings. As such, the Government would not dictate the order in which Plaintiffs call their witnesses.

If the Court accepts the Plaintiffs plan, the Court will hear from 33 live Plaintiff witnesses before receiving any information from experts associated with those Plaintiffs. Although it may preserve some financial resources, the Court's charge is to determine the appropriate amount of damages, if any, to be awarded to each distinct Plaintiff. The Government's trial plan presents the Court with discrete and easily distinguishable segments.

The Government's trial plan would not prevent the parties from agreeing to present witnesses by deposition designations, or by trial deposition, though the Government opposes any requirement to agree to such depositions regardless of which trial plan is accepted. Accordingly, the number of witnesses would not be substantially greater than Plaintiffs' trial plan. The Government would not be calling 100 separate live witnesses. While the Government's plan would require certain experts to testify multiple times, it is anticipated that areas of testimony, such as the experts' general methodologies, would not be repeated. The total length of each expert's testimony should therefore not be significantly longer than if he or she only testified once.

Respectfully Submitted,

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